RE NORMAH KASSIM EX P PUBLIC FINANCE BHD

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[BANKRUPTCY NO: MT1-29-2583-1998]
6 SEPTEMBER 2002

BANKRUPTCY: *Petition - Petition presented by corporation - Section 133 of Bankruptcy Act 1967 and r. 215 of Bankruptcy Rules 1969 - Whether issued by an officer duly authorised under creditor's seal - Validity of creditor's petition - Petition served without verifying affidavits - Whether mandatory to serve both together - Whether petition rendered invalid*

BANKRUPTCY: *Petition - Petition against a firm - Petition registered in individual's name - Whether ought to be company's title - Bankruptcy Rules 1969, s. 104*

After obtaining judgment, Public Finance Bhd ('the creditor') filed a creditor's petition against Normah Kassim ('the debtor'). The debtor challenged the said petition on three grounds. Firstly, she contended that Ramli Mat Rani, who had affirmed the affidavit and signed the petition on behalf of the creditor was not duly authorised under the creditor's seal. Secondly, she argued that the petition was incompetent as it was served without the verifying affidavits. Thirdly, she submitted that as the petition was registered in her name instead of her business concern, the creditor had breached a mandatory requirement under r. 104 of the Bankruptcy Rules 1969 ('the Rules').

When the deputy registrar dismissed the debtor's application to set aside the said petition she appealed to the judge in chambers.

Held:

[1] Under r. 215 of the Rules, a company, in presenting a bankruptcy petition to a bankrupt, may be represented by any of its officers authorised under the seal of the corporation or as defined by s. 131 of the Bankruptcy Act 1967 ('the Act'). In absence of any cogent proof to confirm that the said Ramli was authorised under seal to act on the company's behalf, the creditor had failed to prove that they had complied with r. 215. This rendered the petition a nullity. (pp 651 g-i, 652 a & 653 d-e)

[2] It was not mandatory for the verifying affidavits to be served with the petition. Neither s. 6 of the Act nor r. 106 of the Rules demand that the petition must be attached to the verifying affidavit. The provisions merely promulgate that a creditor's petition shall be verified by affidavit. So long

as the verifying affidavit was filed prior to the decision-making of the registrar pursuant to his investigation under r. 108, followed by the sealing and returning of the petition for service, that will suffice. Furthermore, the fact that the verifying affidavits were never served on the debtor in the present case would not have prejudiced her rights and even if there had been some procedural defect, it was not such that would occasion substantial injustice. (p 655 h)

[3] Regarding r. 104 of the Rules, the purpose of the statement of names and addresses of the demanded was only meant to assist the registrar in his investigative purposes. At present, as the appellant was the owner of the company, the issue of being compromised or prejudiced did not arise. The verifying affidavit and relevant documents had already been made available to the court. Therefore, the non-service of the statement stated in r. 104 was of no consequence to her. (p 657 g)

[Appeal allowed with costs; creditor's petition dismissed.]

Case(s) referred to:

Loo Cheng Liang v. Ban Hin Lee Bank Bhd [1992] 2 CLJ 1219; [1992] 2 CLJ (Rep) 800 ***(refd)***

Ooi Thean Chuan v. Banque Nationale de Paris [1992] 2 CLJ 1225; [1992] 3 CLJ (Rep) 160 ***(refd)***

Re Chen Sing Chew [1974] 2 MLJ 69 ***(refd)***

Re Dato' Othman Bokhari ex p Diners Club (M) Sdn Bhd [1998] 4 CLJ Supp 315 ***(refd)***

Re Haroun Al-Rashid Mohd Yusof ex p Daya Leasing Sdn Bhd [1996] 2 CLJ 516 ***(refd)***

Re Lee Boon Hooi ex p Tan Ket Huat [1992] 4 CLJ 1903; [1992] 2 CLJ 699 ***(refd)***

Re Lim Chooi Sang ex p Soon Fay Sdn Bhd [1999] 5 CLJ 605 ***(refd)***

Re Samuel Pakianathan Jabamanickam ex p Perwira Habib Bank (M) Bhd [1997] 5 MLJ 737 ***(refd)***

Re Solid H Gold Engineering [1988] 3 MLJ 456 ***(refd)***

Sobri Arshad v. Associated Tractors Sdn Bhd [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756 ***(refd)***

Tan Siew Peng v. MUI Finance Bhd [1996] 1 BLJ 439 ***(refd)***

Teoh Thean Peng v. D & C Leasing Sdn Bhd [1993] 2 CLJ 665 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 6(1), (2), 131, 133

Bankruptcy Rules 1969, rr. 104, 106, 108, 215

Other source(s) referred to:

Khoo Kay Ping, *The Law an Practice of Bankruptcy in Malaysia,* pp 94, 95

Williams & Muir Hunter, *Bankruptcy,* p 592

For the appellate/judgment debtor - Thaiyub Khan; M/s Thaiyub Khan Othman & Co

For the respondent/judgment creditor - Frank Chin; M/s Nordin Hamid & Co

Reported by M Maheswaran

JUDGMENT

Suriyadi Halim Omar J:

From the brief facts adduced, after obtaining judgment against the debtor, the creditor had filed a creditor's petition against her. The latter had challenged the petition by filing encl. 11, and had raised three issues, namely:

i. The officer of the petitioning creditor, one Encik Ramli bin Mat Rani who affirmed the affidavit verifying the truth of statements and who also signed the petition on behalf of the petitioning creditor, was not duly authorized under the seal of the creditor;

ii. as the affidavit verifying the truth of statements in the petition had not been served on the debtor, which was not denied, the petition thus was incompetent; and

iii. in the alternative, with the failure of the creditor to comply with r. 104 of the Bankruptcy Rules 1969, which was a mandatory requirement, the petition thus was flawed.

On 23 August 2000 the learned Timbalan Pendaftar had dismissed encl. 11, which was supported by affidavit. Being unhappy the debtor had filed an appeal to the judge-in-chambers. The same arguments as above were repeated before me.

A debtor may be petitioned to be a bankrupt, *inter alia*, by an individual, a firm, or a company, foreign-based or otherwise, and in the context of this case, by a company. As for the latter, the Bankruptcy Act 1967 legislates that a company may be represented by any of its officers authorised on that behalf under the seal of the corporation (s. 133). Rule 215 of the Bankruptcy Rules 1969 reads:

> Where a corporation presents a petition or takes any other action under this Act, **this** officer of the corporation may act in his own name, stating that he is such officer duly authorised under seal; but a petition may be presented by the corporation, and signed by **the** officer on its behalf. Any person chosen by the corporation to act for it as agent, is an 'officer' within section 133, and if duly authorized under seal can act for the corporation (emphasis added).

In a gist the abovementioned rule provides that a company may present a petition by any of its officers, provided he is authorized under seal, or if under the company's name signed by an officer authorized under seal on behalf of the company.

Being subject to the canon of construction, I have not hesitated to arrive at the latter interpretation also ie, if a company has presented a petition but signed by its officer on behalf of the company, it cannot be just about any officer who works with that company. An officer authorized under seal still must sign it. This is so as the word or words used are **"the officer"**, a specific and identifiable person. I construe it that **"the officer"** must relate to **"this officer"** (the person authorised under seal), found and promulgated in the earlier sentence. If just about any officer could sign, surely Parliament would have adverted to the word **"an officer"**.

So, was Ramli b. Mat Rani authorised to act on behalf of the company in relation to this case when he signed the creditor's petition? To answer this question there is a need for me to peruse the evidence, with particular reference to the authority given to him by one Teh Hong Piow, for him to act as the true and lawful substitute attorney of the latter. Teh Hong Piow was supposed to have been vested with powers by a power of attorney dated 12 October 1972 given under the hand and seal of the finance company (RMR 3 of encl. 10). Perusing the Restricted Substitute Power of Attorney further, it was crystal clear that the supposed power vested under seal on Ramli b. Mat Rani was never given by the company but sub-delegated to him by Teh Hong Piow. As the powers came from the latter it was indisputable that it was once removed.

Even though the supposed powers of Teh Hong Piow was alleged to flow from a Power of Attorney, bestowed on him under the seal and hand of the creditor company, yet having gone through all the exhibits, I was unable to find that impugned Power of Attorney. With the linkage between the company and the authority given to Ramli b. Mat Rani being severed, due to its non-production and admittedly not to have been filed, I was thus deprived of the opportunity to peruse it. That being so it was not possible for me to arrive at a finding of fact, of the legality of the investment of the disputed powers. I did not even know whether this Teh Hong Piow had been chosen by the corporation to act for it as an agent (an 'officer') within the context of s. 133 of the Bankruptcy Act. As regards the requirement of evidence, in *Tan Siew Peng v. MUI Finance Berhad* [1996] 1 BLJ 439 Chin Fook Yen JC had no qualms about endorsing the sub-delegation of authority as being sufficiently acceptable (under seal and pursuant to a Power of Attorney), as the issue of lack of

evidence did not arise there. In similar vein, in *Re Samuel Pakianathan a/l Jabamanickam, ex p Perwira Habib Bank (M) Bhd* [1997] 5 MLJ 737 at p. 757, the court also demanded some evidence be presented in court to show that the relevant officers were indeed authorised. In *Re Lim Chooi Sang, ex p Soon Fay Sdn Bhd* [1999] 5 CLJ 605 the proof came sufficiently in the form of the affixation of the seal of the corporation to the authorisation, without the necessity of adducing the board's resolution (see also *Re Haroun Al-Rashid bin Mohd Yusof ex parte; Daya Leasing Sdn Bhd* [1996] 2 CLJ 516). Even if Teh Hong Piow in reality were the owner of the creditor company, by virtue of the separate entity concept of company law, at best I could conclude that the powers vested on Ramli b. Mat Rani was given by the former, and never by the company.

I have avoided dealing with the legal issue of whether, had the Power of Attorney been exhibited and Teh Hong Piow could vest such powers to any employee, including Ramli b. Mat Rani, the act of the latter thus was in order. Suffice for me to state that based on the available evidence, as there was no cogent proof to confirm that the latter was authorized under seal to act on behalf of the company, the creditor had failed to prove that r. 215 had been complied with by the creditor. Without the required proof, hence concluding that Ramli b. Mat Rani was not authorized to commence the proceeding, the petition thus would be a nullity (*Re Chen Sing Chew* [1974] 2 MLJ 69; *The Law and Practice of Bankruptcy in Malaysia* by Khoo Kay Ping).

The next issue for my consideration was whether the non-serving of the affidavit verifying the truth of the statements in the petition, to the debtor caused the petition to be incompetent. The affidavit of Ramli b. Mat Rani, an officer of the creditor not only did not deny that that affidavit had not been served, but even admitted by the petitioner's counsel of its non-service. Under s. 6(1) of the Bankruptcy Act 1967, it is provided that a creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and shall be served as prescribed. An appreciation of this section convinced me that what will be mandatorily required to be served is the creditor's petition and not the verifying affidavit (see also *Re Dato' Othman Bokhari ex p Diners Club (M) Sdn Bhd* [1998] 4 CLJ Supp 315). To serve the verifying affidavit and not the petition would be absolutely illogical (see later explanation). Neither does it also say that the two sets of documents must be served simultaneously. Rule 106 of the Rules of Bankruptcy similarly repeats the requirement of the verification of the creditor's petition by an affidavit of the petitioning creditor or by some other knowledgeable person, but nothing is said of the service. The form to be used for the verification will be that of Form 11 invariably subject to variations, as permitted by r. 4.

A cursory reading of the Rules unfortunately will not enlighten the reader when that verifying affidavit has to be affirmed, let alone its purpose. I could only conclude that the verifying affidavit must be for the purpose of convincing the registrar, on receiving the petition that the petition is in order, before sealing the copies of the petition for service to be carried out by the petitioner (r. 108). Williams and Muir Hunter on *Bankruptcy* at p. 592 had occasion to author:

> Since bankruptcy is a matter which affects the general public, the court must see that all requirements of the Act and the rules have been carried out. B.R 151 *ante*, imposes on the registrar the duty of investigating the statements in the petition; ...

At p. 591 it was also authored:

> The court will not make a receiving order solely on the affidavit verifying the petition, **the object of which is merely to justify the sealing of the petition** (*Ex p. Lindsay* [1874] LR 19 Eq. 52) ... (emphasis added)

Edgar Joseph Jr. J in *Loo Cheng Liang v. Ban Hin Lee Bank Bhd* [1992] 2 CLJ 1219; [1992] 2 CLJ (Rep) 800 had occasion to decide that where the petition is not so verified, the petition and all subsequent proceedings are a nullity. Even s. 131 of the Bankruptcy Act cannot save the proceedings. In *Sobri bin Arshad v. Associated Tractors Sdn Bhd* [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756 Edgar Joseph Jr. J also had occasion to rule that the affidavit verifying the creditor's petition had to be sworn after the presentation of the petition. On reflection of the abovementioned r. 108, if the registrar could not verify the statement in the petition, and witnesses are required to be summoned to prove the same, it would appear that these witnesses would be in the same class as the verifying affidavit. They, *viz*. the witnesses in term of sequence will come after the presentation of the petition, thus vindicating Justice Edgar. In the latter situation, how then thus one comply with the requirement that the petition be annexed to the verifying affidavit, when the other supplementary verifying affidavits will come very late in the day and certainly not filed on the date of the presentation of the petition? Similarly how does one annex the petition to the evidence of witnesses who have been summoned at a later stage to help the registrar in his investigation?

With the exception of cases in the like of *Teoh Thean Peng v. D&C Leasing Sdn Bhd* [1993] 2 CLJ 665, the above case of *Sobri bin Arshad v. Associated Tractors Sdn Bhd* unfortunately failed to attract followers. As for the reasons of that failure, I can do no better than reproduce what Khoo Kay Ping *(supra)* authored at pp. 94 and 95, which read:

(a) Neither the Act nor the Rules requires the affidavits to be affirmed after the presentation of the petition unlike r. 26 of the Companies (Winding-up Rules) ...

(b) For the petition to be presented with the verifying affidavit annexed to it, the affidavit has to be affirmed prior to the presentation of the petition.

(c) It is practical, convenient and cost-saving for the affidavit to be affirmed before filing as all the documents can be filed simultaneously and the petitions may be immediately processed by the registrar. Without the affidavit, the petition will not be sealed by the court.

From the above conclusions, founded on a plethora of case laws, the verifying affidavit may be sworn before or on the same date as the petition is dated and presented. The above effect would certainly be watered down by Mahadev Shankar J when His Lordship in *Re Lee Boon Hooi ex p Tan Ket Huat* [1992] 4 CLJ 1903; [1992] 2 CLJ (Rep) 699 opined that the affirmation of the affidavit occurred before the petition was filed, but after it had been duly attested, was merely permissible (see also *Teoh Thean Peng v. D&C Leasing Sdn Bhd (supra)*).

Perusing Form 11 which is pursuant to r. 106, the opening portion of the "Affidavit of Truth of Statements in Petition" reads as follows:

> I, the petitioner named in the petition hereunto annexed, affirm ... and say ...

It was due to the terminology applied above ie, "annexed', that case laws in the like of *Ooi Thean Chuan v. Banque Nationale de Paris* [1992] 2 CLJ 1225; [1992] 3 CLJ (Rep) 160, had interpreted that word to mean that the petition must be 'tied, bound, attached, subjoined, added, united, affixed or otherwise physically jointed" to the affidavit. This issue of the requirement of the petition being annexed to the verifying affidavit interestingly was created by the language of Form 11, a modifiable procedural format. Due to cases producing such enunciations, the effect of that terminology of "annexed" which were non-issues before, have blossomed to the current level hence requiring some legal prognosis.

Administratively so long as the creditor's petition can be verified, with logic requiring that the verifying affidavit be filed prior to the decision making of the registrar pursuant to his investigation, followed by the sealing, and returning of the petition for service, that will suffice (r. 108). With that scenario in mind, surely no petitioner would dare be negligent or fail to supply the sufficiently required and convincing affidavits for the perusal and action of the registrar. Indisputably without the affidavits the petition certainly cannot

move forward to the next stage and hence defeat the very purpose of the petitioner. The value of the petition being securely fastened to the verifying affidavits will be appreciated when the registrar is complying with the said r. 108, and no more. His work will certainly be made more pleasant and administratively smooth if the paper work were in order. Therefore I construe the format in Form 11, which is procedural in nature, and subject to modification (r. 4), a portrayal of the perfect scenario for the registrar when about to launch his investigation. Only the registrar has much use of that verifying affidavit and that helpful controversial annexation, and even that at the inception stage.

Based on the above reasons, and the fact that neither does s. 6 nor r. 106 demands that the petition must be attached to the verifying affidavit, let alone the latter is principally to help the registrar, I am unable to concede to the argument that such a requirement is mandatory. Both of the provisions merely promulgate that a creditor's petition shall be verified by affidavit (unlike r. 111).

In this case, the fact that the verifying affidavit was never served on the debtor would not have prejudiced his rights; in fact it will not even be useful to him. Even if there had been some procedural defect, this defect certainly was not something that would have caused substantial injustice to him (s. 131). Under s. 6(1) of the Bankruptcy Act before making the receiving order, the court shall only require proof of the debt of the petitioning creditor and proof of the act of bankruptcy, and if the debtor were not to be present, proof of service of the petition (s. 6(2)). Nothing is mentioned of the verifying affidavit, as the time is past for its relevancy. On that note, it is my view that it is not mandatorily required that the verifying affidavit be served on the debtor.

The last ground referred to by the learned counsel for the appellant was that there was non-compliance of r. 104 of the Bankruptcy Rules. In this case the petition was registered in the name of the appellant ie, Normah Kassim and not One Stop Service Station ie, the former's business name. Rule 104 reads:

(1) Upon filing of a petition by or against a debtor firm in the firm's name the petitioner shall file a statement of the names and addresses of the partners as they appear in the register under the Registration of Businesses Ordinance as at the date of the presentation of the petition.

(2) Where a petition is filed by or against an individual debtor carrying on business in a name other than his own, para. (1) of the rule shall apply with the necessary modifications.

In the course of my research I must admit that apart from counsel not being much of a help on this legal issue, I was further hampered by the dearth of material on this subject, hence the return to basics. In this case both parties had agreed that the petitioner had not complied with this rule, meaning that the petitioner had breached another requirement of the statute. An intense scrutiny of r. 104 will strike the mind of any practitioner immediately that the word used, gives a picture of it being a mandatory provision. On the other hand, built within the statute itself are provisions which have anticipated certain excusable breaches in the like of s. 131 of the Bankruptcy Act. Case laws have also provided a wide range of situations, where whenever breaches have occurred have been allowed to filter though.

The main reason adverted to by judges is that the breaches will not cause any substantial injustice to the debtor.

Returning to r. 104 I am of the view that, similar to the purpose of the verifying affidavit, the statement of the names and addresses of the partners demanded, is only meant to assist the registrar in his investigative duties. He will be able to ascertain from the documents supplied whether eg, a partner being sued was a partner at the time of the presentation of the petition and not at some other time (*Re Solid H Gold Engineering* [1988] 3 MLJ 456/460 para B (left)). The registrar has to ensure that an innocent person is not dragged into the affray founded on shoddy work, as a bankruptcy proceeding is a public matter with the repercussion of untold misery to the latter.

In the current case, since Normah Kassim was the sole owner of the business carrying on under the banner of "One Stop Station", under no circumstance could she have been compromised or prejudiced, which could have caused substantial injustice to her. The verifying affidavit and every relevant documents had already been made available to the court, and as such the non-service of the statement was of no consequence to her. Had there been partners in the business then my view would certainly have taken a different course.

Regardless of the above view I was satisfied that the issue of non-compliance of r. 104 made no difference to this appeal, as I already was satisfied that based on the first ground of the appellant, it was sufficient for me to allow the appeal with costs. But it must be borne in mind that as a bankruptcy proceeding has a quasi-penal effect, any irregularity, flaw, defect, or anything found wanting in the actions of a petitioner will be frowned upon by the court.

If pin-prick irregularities if found one too many, and when amassed together may cause substantial injustice to the debtor, such petition will certainly deserve a striking out order.

Based on the above reasons, I allowed the appeal with costs, and had the creditor's petition dismissed.